STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT
(On Appeal from the Oakland County Circuit Court and the Michigan Court of Appeals)

DOUGLAS LATHAM,

Plaintiff-Appellee,

v

BARTON MALOW CO.,

Defendant-Appellant.

MSC Docket No. 148929

COA Docket Nos. 312141 & 313606

Lower Court No. 04-059653-NO

DEFENDANT BARTON MALOW COMPANY'S SUPPLEMENTAL BRIEF IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL

ORAL ARGUMENT REQUESTED

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STATEMENT OF QUESTION PRESENTED

WHETHER A SIGNIFICANT NUMBER OF WORKERS WERE EXPOSED TO THE HIGH DEGREE OF RISK IDENTIFIED BY THIS COURT IN *LATHAM V BARTON MALOW CO*, 480 MICH 105, 114 (2008)("THE DANGER OF WORKING AT HEIGHTS WITHOUT FALL-PROTECTION EQUIPMENT")?

Appellant answers:	No
The trial court would answer:	Yes
The Court of Appeals would answer:	Yes
Appellee will answer:	Yes

SUPPLEMENTAL BRIEF

Introduction

In scheduling this matter for oral argument, this Court has directed the parties to focus on one issue: "whether a significant number of workers were exposed to the high degree of risk identified by this Court in *Latham v Barton Malow Co*, 480 Mich 105, 114 (2008)("the danger of *working at heights without fall-protection equipment*")." Defendant respectfully contends that Plaintiff failed to establish that a significant number of workers were exposed to the high degree of risk in working at heights without fall-protection. Plaintiff's expert witness explained that not all work at heights requires fall protection. He specifically testified that: (a) fall protection was not required while operating or riding in the scissor lift; (b) fall protection was not required when workers were at least six feet away from an opening; (c) fall protection was not required when workers were working near and around areas that had studs and horizontal cross members in place. Although Plaintiff referenced observing several workers at heights without fall protection, Plaintiff did not introduce evidence that any of the workers that he allegedly observed at heights without fall protection were actually performing work that required them to wear fall protection equipment. The workers observed by Plaintiff were certainly not exposed to any danger, much less the specific danger Plaintiff caused for himself. Accordingly, this Court should reverse the lower courts and rule that Defendant was entitled to dispositive relief.

Statement of Facts

Overview

There are numerous situations where, despite working at heights, the construction workers are not required to wear fall protection. In those circumstances, the failure to wear fall

protection is not a danger and does not expose the workers to a high degree of risk. In fact, in some circumstances, wearing fall protection would be dangerous or impede the work operation.

The essence of Defendant's argument from the very first summary disposition motion is that Plaintiff has simply failed to show that a significant number of workers were exposed to a danger, much less a danger that constituted a high degree of risk because of not wearing fall protection. This is because Plaintiff has not shown that any of the other workers on site worked at heights *and* failed to wear necessary fall protection. Plaintiff has routinely and consistently limited his analysis to whether trades or individuals were at heights, rather than addressing the issue of whether these workers were exposed to a danger, much less the same danger as Plaintiff. This pattern continued through the trial in this matter, where Plaintiff introduced evidence that he observed some workers at heights without fall protection, but did not follow-through with evidence that these workers required fall protection for their work. Plaintiff's expert's testimony established that not all work at heights required fall protection. Thus, as will be explained below, even viewing the following facts in a light most favorable to Plaintiff, a significant number of workers were not exposed to a high degree of risk.

Litigation History

Defendant is not going to endeavor to recite the entire litigation history for this matter. As this Court is aware, it previously entertained oral argument on Defendant's application for leave to appeal, resulting in this Court's 2008 decision in *Latham v Barton Malow Co* (*Latham II*),[1] 480 Mich 105, 114; 746 NW2d 868 (2008). The *Latham II* majority opinion recited the basic factual nature of this dispute:

[1] For ease of reference (to the extent ease of reference is even possible), this brief will refer to the various *Latham* appellate decisions as follows: *Latham v Barton Malow Co* ("Latham I"), unpublished per curiam opinion of the Michigan Court of Appeals (Docket No. 264243, issued

> Plaintiff was a carpenter employed by B & H Construction to work on the construction of a new school building. Defendant Barton Malow Company was the construction manager on the project. On the day of plaintiff's injury, plaintiff and a coworker were moving sheets of drywall from a scissors lift to the mezzanine level of the project. They raised the lift to the height of the mezzanine and removed the cable barrier around the perimeter of the mezzanine, an action required to allow ingress. When they began carrying the first sheet of drywall from the lift to the mezzanine, plaintiff was not wearing a fall-protection harness, contrary to jobsite rules of which he was aware. As plaintiff was moving onto the mezzanine, the sheet of drywall cracked and plaintiff lost his balance, falling 13 to 17 feet to the floor. **He was injured, but undisputedly would not have been had he been wearing the required protective harness**. [*Id.* at 108; emphasis added.]

Indeed, as of 2008, Plaintiff's position had consistently been that he was not supplied a protective harness to wear and that having a protective harness would have prevented the injury. Plaintiff did not contend that a protective harness would have been ineffective. That was the issue Plaintiff presented to this Court as of 2008.

When Plaintiff testified at trial, however, he explained that that there was fall protection—including safety harnesses and lanyards—in the B&H Construction "gang box" on the construction site (Tr IV,[2] 49). Plaintiff noted that he had been trained on how to use personal fall protection and had many opportunities where he should have worn same (T r IV, 52). Amazingly, however, Plaintiff testified that he had never used personal fall protection on a

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October 17, 2006), rev'd by *Latham v Barton Malow Co* ("Latham II"), 480 Mich 105; 746 NW2d 868 (2008); *Latham v Barton Malow Co* ("Latham III"), unpublished per curiam opinion of the Michigan Court of Appeals (Docket No. 290268, issued December 7, 2010), lv den *Latham v Barton Malow Co* ("Latham IV"), 489 Mich 899; 796 NW2d 253 (2011); and *Latham v Barton Malow Co* ("Latham V"), unpublished per curiam opinion of the Michigan Court of Appeals (Docket Nos. 312141 and 313606, issued February 14, 2014).

[2] For ease of reference, and in light of the court reporter's rather confusing break-up of the testimony, Defendant will refer to the trial transcripts as follows: "Tr I" (transcript of April 30, 2012, trial); "Tr II" (transcript of the May 1, 2012, trial, except for Gary Jordan's testimony); "Tr IIA" (transcript of the Gary Jordan testimony on May 1, 2012; "Tr IIIA" (transcript of the Gary Jordan testimony on May 3, 2012); "Tr III" (transcript of May 3, 2012, trial, except for Gary Jordan's testimony); "Tr IV" (transcript of May 4, 2012, trial); "Tr V" (transcript of May 7,

construction site (Tr IV, 52). This bears repeating—notwithstanding Plaintiff's briefing prior to *Latham II*—Plaintiff never used personal fall protection on any site, ever[3] (Tr IV, 52-53). This certainly undermines the entire premise of the pre-2008 litigation in this matter.

When opposing summary disposition before the 2008 decision by this Court, Plaintiff took the position that the courts could look to the number of trades that accessed an elevation to determine whether a significant number of workers were exposed to a high degree of risk (Plaintiff's 2005 summary disposition brief, Attachment 1 (without exhibits), 14-18). Plaintiff referred only to the sequence of the trades. *Id.* Defendant's reply brief noted this deficiency, arguing that Plaintiff could not simply identify trades on the site or working on the elevation; instead, Plaintiff had to also show that these workers were exposed to a high degree of risk while working at an elevation (Defendant's reply brief, Attachment 2). It was not enough to merely state that workers were at heights. Proof of a danger was also required.

This Court recognized in 2008 that Defend ant identified that Plaintiff must show a dangerous condition and not merely a presence on an elevation:

> With the relevant danger correctly perceived, the error of the lower courts' analyses becomes apparent. While defendant's motion for summary disposition identified the correct danger and further raised the issue that plaintiff's own failure to wear a fall-protection device did not create a high degree of risk to a significant number of workers, the trial court and the Court of Appeals erred by misidentifying the danger and inevitably erred in the subsequent analysis regarding how many other workers were exposed to the risk. [*Latham II, supra* at 114-115.]

The fact that trades and workers were at heights did not mean that they were exposed to any danger.

2012, trial, excluding Steven Williams); "Tr VA" (transcript of testimony of Steven Williams on May 7, 2012); and "Tr VI" (transcript of May 8, 2012, trial).

[3] Plaintiff signed a document noting that he would "rope off or barricade a danger area" and use safety belts when working at "unprotected high places" (Tr IIIA, 64-65).

Defendant posits that the confusing part for the lower courts is that mere presence of a trade in an area can be used to differentiate a "common work area" from an area where workers are "working in isolation." But the elements of the common work area exception have always recognized a clear difference between the elements of "common work area" and "high degree of risk to a significant number of workers." Accordingly, this Court had little difficulty in concluding that the lower courts had erred and remanding for a first, proper analysis of whether a significant number of workers were exposed to the claimed danger.

After the remand, the trial court recognized that Plaintiff had a lengthy discovery period, as well as a very lengthy time period to respond to Defendant's motion for summary disposition. Accordingly, the trial court limited Plaintiff to the record developed before this Court's decision in *Latham II*, which resulted in summary disposition for Defendant. The Michigan Court of Appeals reversed in *Latham III*, inexplicably ruling that the trial court had somehow abused its discretion in limiting Plaintiff to the trial court record before 2008—even though Plaintiff had more than six months between the filing of Defendant's motion for summary disposition and the hearing on the motion. *Latham III.* This Court declined to intervene at that time. *Latham IV.* This led to the remand to the trial court for the pre-trial and trial proceedings pertinent to the instant appeal.

The Evidence Regarding Exposure to an Allegedly Dangerous Condition

Again, although the proofs submitted by Plaintiff before this Court's 2008 decision were limited to a mere listing of trades, the additional evidence in this matter after *Latham III* was only 10-year-old recollections by Plaintiff and a longtime colleague. The incident in question occurred on January 22, 2002 (Attachment 1, 1). The trial in this matter occurred in May 2012—more than 10 years later.

Plaintiff testified that he observed two electricians, four B&H employees, and two HVAC workers on a different mezzanine—the first mezzanine that Plaintiff worked on (erecting drywall) (Tr III, 40-41). He also testified that he did not observe any of these eight people wearing fall protection at the time of his observation (Tr III, 41; Tr IV). Scott Schrewe, Plaintiff's replacement on the work site and a friend for twenty years, testified that he also recalled one or two HVAC workers on a mezzanine without fall protection (Tr III, 10, 21). This is the sole evidence introduced by Plaintiff regarding specific numbers of workers and fall protection.

The problem for Plaintiff, however, is that working on the mezzanine (or any mezzanine or heights) does not necessarily lead to a danger because not all work at heights requires fall protection. Indeed, Plaintiff's own expert, David Brayton, testified regarding same:

Q: So if B&H was going to go up there to put up the wallboard, they were going to have to construct some other barrier, in your opinion, before they put up the drywall because they'd have to get closer to—

A: No.

Q: --closer than six foot?

A: MIOSHA--MIOSHA would never require that.

Q: Okay. So it's not a requirement to have the horizontal-

A: Not--they're closing the gap.

Q: Okay.

A: Essentially, they're making a barricade when they put the drywall up.

Q: But what--how--do they have to wear a harness then?

A: No.

Q: Okay. Well, how about a guy like Mr. Latham, who's, you know, a lot slighter than I am, a slight guy, he could actually go through those?

A: It would impede the work operation.

Q: So no harness is required when you're working on the mezzanine?

A: I can't imagine it.

Q: Okay.

A: I cannot imagine that anyone in MIOSHA would write that violation. [Tr IV, 177.]

Brayton explained that requiring fall protection is not required where it would "impede the work operation" (Tr IV, 177). Importantly, Plaintiff and his co-workers would not have been required to wear fall protection while erecting drywall on the mezzanine.

Brayton further testified that no fall protection was required if workers were more than six feet away from an opening or if there were studs and horizontal cross members in place:

Q. Let's say this is a mezzanine, just a—it's kind of a big square. It's not totally square. But if you have a mezzanine, and let's say you've got the openings here, you have the mezzanine. If your workers somehow are cordoned off six feet away from that, that is sufficient?

A. That is acceptable.

* * *

Q. But in this case, there's studs and horizontal members?

A. If you had studs and horizontal members in, then you'd be okay.

Q. Okay. All right. And this—as long as they're six foot back, there's no need for any other guarding, correct?

A. Correct.

Q. And if this was the case, no harnesses were required, correct?

A. Right. (Tr IV, 175-176).

Although Brayton suggested that horizontal members would have been required for *other trades* on the mezzanine, Brayton did not know one way or another whether there were horizontal members in place—forcing the jury to speculate (Tr IV, 175). Plaintiff also did not introduce any testimony to establish the location of the workers on the mezzanine. Therefore, relative to workers other than Plaintiff, Plaintiff fell well short in establishing that any worker on either of the two mezzanines were exposed to any danger by allegedly working without fall protection.

In addition, Brayton also testified that no fall protection was required while riding the scissor lift:

> A. They are not required on scissors. Some of them do have them. And tying off in a scissors lift is not required by MIOSHA nor OSHA nor the manufacturers.
>
> Q. Thank you. So let me just follow up with that. So if two men got on a scissor lift, if Mr. Clingenpeel and Mr. Latham got on a scissor lift, there is no requirement for them to harness up, correct?
>
> A. True.
>
> Q. Okay. Because you can be on a scissor lift without a harness and a lanyard?
>
> A. Yes.
>
> Q. Okay. So if—just operating a scissor lift, if you're going to operate the scissor lift on a work site, you don't' have to be wearing a harness and a lanyard while you're driving it around.
>
> A. Not on a scissors, no. [(Tr IV, 173).]

At most, Brayton merely opined that fall protection would have been required when moving from the scissor lift to the mezzanine (Tr IV, 152). Again, however, there is no evidence that any worker from any other trade accessed the mezzanine via a scissor lift.

Instead, the evidence on this matter was that the workers from every other trade accessed the mezzanine by ladder, rather than scissor lift. Ted Crossley testified that, when other trades

accessed the mezzanines, these 15 or 20 workers used ladders for personnel and lifting equipment for the materials (Tr II, 148). Even Plaintiff noted that he used a ladder when accessing the first mezzanine (Tr IV, 55, 71). This ladder option is very important because Defendant's expert, Steven Williams, provided unrebutted testimony that fall protection was not required while accessing the mezzanine by ladder (Tr VA, 41). Gary Jordan similarly testified that Plaintiff could have used a ladder to access the mezzanine area and that no personal fall protection would have been required (Tr IIIA, 87). This combined testimony establishes, therefore, that no other workers (including Plaintiff on a prior occasion) required personal fall protection when accessing the mezzanine. The only four workers to allegedly move from a scissor lift to the second mezzanine were Plaintiff, his partner (Tom Clingenpeel), Scott Schrewe, and Schrewe's partner.

Plaintiff also testified that this incident occurred before he even reached the mezzanine (from the scissor lift):

> Q. Okay. So the fall occurs when you're leaving the scissor lift and getting onto the mezzanine?
>
> A. Yes sir. [Tr IV, 80.]

In addition, the instant matter presents the unique situation where Plaintiff purposefully parked his scissor lift crookedly, leaving a gap for him to cross over (Tr IV, 9). Plaintiff's own expert, Brayton, agreed that it was "really unsafe" for Plaintiff to position the scissor lift with a gap between it and the mezzanine (Tr IV, 170). Brayton also testified that only Plaintiff and his partner were exposed to a risk of exiting a crookedly parked scissor lift (Tr IV, 178). There is certainly no evidence to the contrary.

Finally, it bears noting that there was absolutely no evidence that Plaintiff's failure to wear personal fall protection exposed anyone else to a dangerous condition at the time of the

incident. In other words, nobody else on the entire construction site was placed at risk by Plaintiff's failure to wear personal fall protection. Moreover, although Plaintiff attempted (successfully) to broaden the temporal parameters to allow evidence of events both before and after the incident, Plaintiff limited the evidence to two mezzanines on what he described in 2005 as a "large construction project with over 130,000 square feet of new construction" (Attachment 1, 4). In contrast, in *Funk v General Motors Corp*, 392 Mich 91, 103-104; 220 NW2d 641 (1974), the defendants' witnesses conceded that nobody wore fall protection on the entire project:

> Arthur Collins, pursuant to his duties as architect-engineer superintendent for General Motors' Argonault Realty Division, was constantly on the construction site and observed numerous tradesmen working on the beams with "no nets or safety lines." Similarly, John McCarty, Darin & Armstrong's project superintendent, during his repeated "tours throughout the day" of the job site, frequently observed men working in the beams, but never saw any "safety belts or safety nets." [*Id.*]

Plaintiff did not present or otherwise elicit any similar testimony in this matter.

As will be explained below, Defendant respectfully contends that Plaintiff failed to establish that a significant number of workers were exposed to a high degree of risk. Additional facts may be set forth below where pertinent to the individual arguments raised on appeal.

ARGUMENT

A SIGNIFICANT NUMBER OF WORKERS WERE NOT EXPOSED TO THE HIGH DEGREE OF RISK IDENTIFIED BY THIS COURT IN *LATHAM V BARTON MALOW CO*, 480 MICH 105, 114 (2008)("THE DANGER OF WORKING AT HEIGHTS WITHOUT FALL-PROTECTION EQUIPMENT")

Introduction

The instant matter involves a claim under the common work area exception to the general rule of nonliability for an injury to an employee of a subcontractor. Although it is an exception to a rule of nonliability, the exception carries the potential for construction in a way that allows the exception to impermissibly "swallow the rule." The lower courts' inability to either properly construe or apply the common work area exception now comes before this Court for a second time. As will be explained below, Plaintiff was unable to satisfy the "high degree of risk to a significant number of workers" element below. Accordingly, this Court should reverse the lower courts and rule that Defendant was entitled to dispositive relief.

History of the Common Work Area Exception

The "common work area" exception was conceived by this Court in *Funk*. Before *Funk*, Plaintiff would not have had any common law theory of recovery against Defendant and would have been limited to a workers' compensation recovery against his own employer. In *Funk*, this Court carved an exception to the general rule based on the unique facts in that case. In *Funk*, there was testimony of a pervasive lack of fall protection on the site:

> The plumbing subcontractor's failure to provide safety equipment for the men working along the steel did not represent just an occasional lapse. The steel frame was a common work area of many trades. Iron workers who "walked [the] beams," and pipe fitters and electricians, although "they were able to gain handholds," were exposed to similar risks. Throughout the especially precarious winter months, when snow and ice made conditions even more hazardous, and subsequently, closer in time to Funk's injury, it was obvious to even the most

> casual observer that the men in the steel were without safety harnesses or belts and there was no safety net under the men.[4]
>
> > [4] **The continual nature of the danger** created by the absence of any safety equipment distinguishes this case from several cited by General Motors and Darin & Armstrong in which the defect which caused plaintiff's injury was not previously apparent. *See Wilson v Portland General Electric,* 252 Or 385; 448 P2d 562 (1968); *Epperly v Seattle,* 65 Wash 2d 777; 399 P2d 591 (1965); *Hurst v Gulf Oil Corp,* 251 F2d 836 (CA 5, 1958).
>
> Arthur Collins, pursuant to his duties as architect-engineer superintendent for General Motors' Argonault Realty Division, **was constantly on the construction site and observed numerous tradesmen working on the beams with "no nets or safety lines."** Similarly, John McCarty, Darin & Armstrong's project superintendent, during his repeated "tours throughout the day" of the job site, **frequently observed men working in the beams, but never saw any "safety belts or safety nets."** [*Funk, supra* at 102-104; emphasis added.]

Indeed, in *Funk*, one witness testified that there were "numerous tradesman" working on the beams without fall protection, while another witness testified that he "frequently" observed workers and never saw them using fall protection. These were defense witnesses providing concessions that distinguished *Funk* from prior cases in Michigan and other jurisdictions. *Funk* was obviously seeking to address the most egregious of job-wide safety violations—where a worker not exposed to the danger would have been the clear exception.

The result of *Funk* was the creation of the common work area exception to the general rule of non-liability. In *Latham II*, this Court recited the elements necessary to support a claim under the common work area exception:

> The elements of such a claim are: (1) the defendant contractor failed to take reasonable steps within its supervisory and coordinating authority (2) to guard against readily observable and avoidable dangers (3) that created a high degree of risk to a significant number of workers (4) in a common work area. [*Latham II, supra* at 109, citing *Ormsby v Capital Welding, Inc*, 471 Mich 45, 57; 684 NW2d 320 (2004); *Funk, supra* at 104.]

In *Ormsby*, this Court further noted that a plaintiff must establish all four elements of the common work area exception; a failure to satisfy even one element defeats the claim. *Ormsby, supra* at 59 n 11.

In the absence of a complete failure of safety as in *Funk*, the appellate courts have had to determine how many workers constitute a "high degree of risk to a significant number of workers." In *Ormsby*, this Court briefly discussed the element, noting that "[t]he high degree of risk to a significant number of workers must exist when the plaintiff is injured; not after construction has been completed." *Ormsby, supra* at 59 n 12. As noted in Defendant's primary brief, the *Latham III* panel of the Court of Appeals is the only panel to not apply footnote 12 of *Ormsby* literally. See Defendant's Application for Leave to Appeal, pp 36-37. With the exception of Defendant, all other common work area defendants since *Ormsby* have had the significant number of workers element determined "at the time of the incident."

This Court's majority opinion also rejected the dissent's position that one worker below the plaintiff who could have been injured by the plaintiff's fall, coupled with the possibility of other workers being near the structure that collapsed causing the plaintiff's fall, was insufficient to constitute a significant number of workers. *Id.* at 59-60. A majority of this Court declined to construe the common work area exception in such a broad manner.

This Court next discussed the "high degree of risk to a significant number of workers in *Latham II*. In *Latham II*, this Court rejected the idea that working at heights is a danger capable of exposing any worker to a high degree of risk. *Id.* at 113-115. In so ruling, this Court precluded Plaintiff from merely identifying trades working at heights to satisfy the "high degree of risk to a significant number of workers" element. Instead, Plaintiff must actually show that workers exposed to a danger. This Court further ruled as follows:

> Accordingly, in this case, as in *Funk*, the danger that created a high degree of risk is correctly characterized as the danger of working at heights without fall-protection equipment. It is this danger to which a significant number of workers must be exposed in order for a claim to exist.
>
> * * *
>
> With the relevant danger correctly perceived, the error of the lower courts' analyses becomes apparent. While defendant's motion for summary disposition identified the correct danger and further raised the issue that plaintiff's own failure to wear a fall-protection device did not create a high degree of risk to a significant number of workers, the trial court and the Court of Appeals erred by misidentifying the danger and inevitably erred in the subsequent analysis regarding how many other workers were exposed to the risk. We therefore reverse the judgment of the Court of Appeals and remand this case to the trial court for further proceedings consistent with this opinion. [*Id.* at 114-115.]

This Court expressly rejected a construction of the common work area exception that would lead to strict liability. *Id.* at 113-114. Instead, Plaintiff was required to prove that a significant number of workers were exposed to a danger—defined at that time as working at heights without fall protection.

This Court dealt with this issue most recently in *Alderman v JC Dev Cmts, LLC (Alderman I),* unpublished per curiam opinion of the Michigan Court of Appeals (Docket No. 285744 issued Aug 25, 2009) (Attachment 3), rev'd *Alderman v JC Dev Cmtys, LLC (Alderman II),* 486 Mich 906; 780 NW2d 840 (2010). In *Alderman*, the plaintiff was part of a six-man crew working on a foundation, when a crane lowering a form onto the foundation contacted a power line, causing electrocution injuries to the plaintiff. The trial court granted summary disposition because only those six workers were exposed to the danger of electrocution by the crane. The *Alderman I* panel, reversed, opining in pertinent part (albeit at length) as follows:

> While defendant focuses on the fact that the crane hit the power lines and endangered only plaintiff's crew and only electrocuted plaintiff, the risk associated with the crane hitting the power line extended far beyond the specific lot where plaintiff was injured. Plaintiff's crew may have been the only subcontractors working on lot 273 when the accident occurred, but the power lines did not merely run along the one lot. They ran along several lots under active

> construction, and electricity is commonly understood to be hazardous. The crane could easily have torn down the power lines, creating a hazard to anyone within striking distance of the fallen lines, or could have caused a fire. The risk of harm associated with a crane hitting the power lines is high and is not as narrow as defendant would suggest. The risk at issue is the potential harm to be had if the crane hit the power lines--not merely the harm to be had if the crane made contact with the power lines and someone was involved in the electrical circuit between the power lines the crane.
>
> Defendant also narrowly defines the "site" as lot 273. It appears, however, that workers of other subcontractors were present on several other lots adjacent to or near lot 273 at the same time plaintiff's crew was working on lot 273 (and specifically when plaintiff was injured), and these other subcontractors were engaged in various aspects of the same general construction project. . . . Where, as here, there were several workers of many different subcontractors in close proximity to the power lines when the accident occurred (and they and others would continue to work in the area), a question of fact exists as to whether the area could be construed as a common work area.
>
> **There is also a question of fact as to whether the risk was posed to a significant number of workers. Defendant suggests that the risk was to a very narrow class of individuals, i.e., only those in immediate contact with metal when the crane touched the wires. As indicated above, the risk could have extended to anyone working on the project within the immediate vicinity of the power lines. It is not only a question of fact whether six constitutes a "significant" number of workers for purposes of the common-work-area doctrine, but the evidence suggests that there were several employees of many subcontractors working within the area beneath or in close proximity to the power lines. These other workers should be considered by the trier of fact in determining whether or not plaintiff was injured in a common work area.**
>
> **Moreover, it appears from the record that the lot upon which plaintiff was injured was only one of thirteen lots in close proximity to the power lines, and that the remaining twelve lots either already had or would require a crane operating near the power lines to build foundations. The workers involved in the use of a crane on these remaining lots (and workers present on adjacent or nearby lots) would be exposed to the same risk of harm. The number of workers at risk over the course of the project could be determined to be far more than six.** [*Alderman I, supra*; emphasis added.]

As the lengthy passage quoted above confirms, the *Alderman I* panel took an extremely broad view of time, geography, and danger when determining whether a significant number of workers encountered a danger that posed a high degree of risk.

In *Alderman II*, this Court reversed the Court of Appeals by order, rejecting such a broad approach, opining in pertinent part as follows:

> The Court of Appeals erred by holding that the common-work-area doctrine applies to this case. The risk of injury at issue here was the risk of electrocution from a subcontractor's crane coming into contact with power lines above the construction site. The only employees exposed to the risk of electrocution were two to six employees of one subcontractor, including the plaintiff, and therefore there was not a high degree of risk to a significant number of workers. *Ormsby v Capital Welding, Inc*, 471 Mich 45, 684 NW2d 320 (2004). [*Id.*]

In so ruling, this Court rejected the idea that the "significant number of workers" element can be satisfied by broad interpretations of the danger, an expansive geographical view of the danger, or a lengthy time period. Instead, this Court construed the "significant number of workers" element by looking to the specific time and place of the plaintiff's injury. This, of course, is consistent with footnote 12 of the *Ormsby* decision, which has applied to all defendants other than Barton Malow. This Court's recent decisions in *Ormsby, Latham II, and Alderman II*, confirm that the "common work area" exception elements are not to be construed in a manner that allows the exception to swallow the rule of nonliability or in a manner that will lead to strict liability.[4]

A Significant Number of Workers Were Not Exposed to the High Degree of Risk Identified by this Court in Latham II

In granting oral argument on the application for leave to appeal, this Court directed the parties to address whether a significant number of workers were exposed to the high degree of risk identified by this Court in *Latham v Barton Malow Co*, 480 Mich 105, 114 (2008)("the danger of *working at heights without fall-protection equipment*"). As will be explained below, although there are various different ways for this Court to analyze the issue, they all lead to the

[4] The workers' compensation system exists to provide far more certain compensation for injuries to an employee.

same result: Plaintiff did not prove that a significant number of workers were exposed to any danger, much less a danger involving a high degree of risk.

The Danger That Plaintiff Actually Encountered

Plaintiff testified that the fall occurred when he was moving from a scissor lift to the mezzanine carrying the first sheet of drywall (Tr IV, 10, 75, 80). His partner Tom Clingenpeel was already on the mezzanine, holding the other end of that sheet (Tr IV, 10). But Plaintiff never even put both feet on the mezzanine, much less perform actual work on the mezzanine (Tr IV, 10). Clingenpeel confirmed that Plaintiff never made it onto the mezzanine (Tr V, 18-19). Plaintiff's lawsuit should have been premised on the failure to wear fall protection while moving from the scissor lift to the mezzanine area—as that is the actual "danger" that he encountered.

The problem for Plaintiff with such a characterized danger is that there is no evidence that anyone other than B&H (Plaintiff's employer) used a scissor lift to access the mezzanine area. In fact, when Plaintiff accessed the first (and only) mezzanine that he worked on the week before, he accessed the mezzanine by ladder (Tr III, 40; V, 55, 71). The only evidence regarding workers crossing from a scissor lift to a mezzanine was that (a) Plaintiff and his partner did so on the day of the incident; and (b) Scott Schrewe and his partner did so following the incident (Tr III, 18-19). There is no other evidence of any worker on the entire construction project using a scissor lift to access a mezzanine. There is no evidence of any other worker crossing from a scissor lift to another height without fall protection. At most, four workers from B&H (including Plaintiff) encountered the same danger as Plaintiff. This is plainly insufficient to satisfy the "high degree of risk to a significant number of workers" element, as more than six workers are required. See *Alderman II, supra.*

Defendant acknowledges that this Court has previously defined the danger as "working at heights without fall protection." *Latham II, supra.* However, this Court remanded because Plaintiff had contended—and the lower courts had accepted—that being at heights, standing alone, meant that there was an exposure to a danger. This Court rather plainly rejected the idea that Plaintiff could simply reference workers being at heights to satisfy the element. Instead, Plaintiff would also have to show that these individuals were exposed to a danger by performing work that required fall protection.

Here, Plaintiff's evidence was limited to individuals that were apparently already on the mezzanine (the first mezzanine). Plaintiff did not testify as to how these individuals accessed the mezzanine in the first place. In contrast, Ted Crossley testified that, when other trades accessed the mezzanines, these 15 or 20 workers used ladders for personnel and lifting equipment for the materials (Tr II, 148). This makes complete sense because, again, Plaintiff agreed that he also used a ladder when accessing the first mezzanine (Tr III, 40; Tr IV, 55, 71). Thus, Plaintiff failed to introduce evidence that any other worker—beyond the aforementioned four B&H employees—used a scissor lift to access the mezzanine without fall protection.

Moreover, Plaintiff cannot rely on those workers that accessed the mezzanine by ladder because those workers did not encounter a danger. Defendant's expert, Steven Williams, provided unrebutted testimony that fall protection is not and was not required while accessing the mezzanine by ladder (Tr VA, 41). Gary Jordan similarly testified that Plaintiff could have used a ladder to access the mezzanine area and that no personal fall protection would have been required (Tr IIIA, 87). Thus, the other workers that accessed the mezzanine by ladder did not encounter any danger and cannot be said to have been exposed to a high degree of risk. They certainly cannot be counted towards the "significant number of workers" analysis. When

properly defined, Plaintiff failed to demonstrate that more than six workers were exposed to the danger he encountered, which precludes him from satisfying the common work area element. *Alderman II, supra.*

Of course, this entire analysis obscures the fact that Plaintiff decided to park the scissor lift at an angle. For whatever reason, and contrary to common sense, Plaintiff was of the opinion that a scissor lifts should be parked at an angle to the elevation being accessed (Tr IV, 7-9). Plaintiff and his partner disagreed regarding the size of the gap created by that angle (Tr IV, 9; Tr V 9). Clingenpeel described the gap as 12 to 16 inches (Tr V, 9). Regardless, Plaintiff's own expert, Brayton, agreed that it was "really unsafe" for Plaintiff to position the scissor lift with a gap between it and the mezzanine (Tr IV, 170). Brayton also testified that only Plaintiff and his partner were exposed to a risk of exiting a crookedly-parked scissor lift (Tr IV, 178). There is certainly no evidence to the contrary. This provides further support for a conclusion that Plaintiff failed to satisfy his burden of proof.

In sum, this is not a matter where Plaintiff ever worked on the mezzanine. Instead, the incident occurred when Plaintiff and his partner crossed a crookedly-parked scissor lift to access the mezzanine. No other workers faced that danger. And only two other workers (Schrewe and his partner) crossed from a scissor lift onto the mezzanine. Every other worker (including Plaintiff the week before) used ladders and did not require fall protection. Accordingly, only two to four workers encountered the same danger as Plaintiff, which fails to satisfy a "high degree of risk to a significant number of workers." *Alderman II, supra.*

Working at Heights Without Fall Protection

Defendant also submitted a supplemental brief to this Court before the *Latham II* decision observing as follows: "Even if other trades worked on the very elevated island at issue, there is

no evidence that **this work** posed any risk because of a lack of personal fall protection" (Defendant's supplemental brief, Attachment 4, 11; emphasis added). Several years later, Plaintiff's expert confirmed same, noting several circumstances where working at heights did not require fall protection. Although Defendant raised this issue years earlier, Plaintiff either could not or chose not to establish that any worker on the two mezzanines at issue did not wear fall protection while performing work that required fall protection. Thus, there is no evidence that any other worker was exposed to a danger by simply "working at heights without fall protection."

As noted above, the evidence on this matter was that the workers from every other trade accessed a mezzanine by ladder, rather than scissor lift. In accessing the mezzanine by ladder, these workers would not have been required to wear fall protection.

Moreover, as for the vaguely-described workers on the mezzanine, Plaintiff did not provide any testimony as to what these workers were doing, much less establish they were doing something that exposed them to a danger if they were performing that work without fall protection. Stated otherwise, there was no proof that any other worker actually required fall protection while working at heights.

In fact, it was Plaintiff's expert who introduced several exceptions for when a worker at heights does not require fall protection. Importantly, Plaintiff's expert agreed that no fall protection was required while Plaintiff was working on the elevation because it would "impede the work operation" (Tr IV, 177). This is important for multiple reasons.

First, this means that Plaintiff cannot count himself and his partner as individuals that were working at heights without fall protection. Similarly, the work performed by Plaintiff on the first mezzanine that he erected drywall on would not have required fall protection (see also

Tr IV, 55)(noting four workers erecting drywall on the first mezzanine). If Plaintiff and his co-workers did not require fall protection to erect drywall, this eliminates several employees that Plaintiff was counting.

Second, this also means that Plaintiff cannot count workers from other trades. Plaintiff did not establish that any of the other workers from other trades were performing work that would have allowed for fall protection without similarly impeding the work operation. Plaintiff simply stated that they were at heights and not wearing fall protection. Plaintiff's expert did not render an opinion regarding the necessity of fall protection for any of the workers allegedly observed by Plaintiff. Plaintiff simply did not follow through by introducing evidence that fall protection was required for any worker for any other trade.

Indeed, Plaintiff's expert provided other examples of why fall protection might not be required for workers at heights. He testified that no fall protection was required if workers were more than six feet away from an edge (Tr IV, 175). Plaintiff did not supply any testimony to establish that any other worker performed work on the mezzanines within six feet of an opening. In addition, Plaintiff's expert further noted that, even if there were only stud walls in place, horizontal cross members would also provide a suitable guardrail (Tr IV, 175). Brayton did not know one way or another whether there were horizontal members in place—forcing the jury to simply speculate (Tr IV, 175). Therefore, relative to workers other than Plaintiff, Plaintiff fell well short in establishing that any worker on either of the two mezzanines at issue were exposed to any danger by allegedly working without fall protection.

It would certainly be inequitable for workers not exposed to any danger to be counted simply because they were working at heights without fall protection. Such a result would be inconsistent with the historical underpinnings of the common work area (which was designed to

protect workers from dangers). At the very least, any of the workers who worked at heights without fall protection—but were not required to wear fall protection due to the specific work they were performing—cannot be said to have been exposed to a high degree of risk for not wearing fall protection. Indeed, if there was a high degree of risk in not wearing fall protection, fall protection would have been required. As Plaintiff's expert explained, there are several circumstances where fall protection is not required by MIOSHA, common sense, and/or experience. Where, as here, Plaintiff failed to establish that workers who did not wear fall protection were required to wear fall protection, Plaintiff cannot establish that those workers were exposed to the high degree of risk contemplated by *Funk* and its progeny. Plaintiff cannot and should not be allowed to count those workers as part of the "significant number of workers" element. Therefore, Plaintiff has failed to prove that a significant number of workers were exposed to a high degree of risk.

Additional Issues Regarding the Significant Number of Workers

There are additional issues that this Court may want to address to provide further guidance to the parties and other litigants. For example, this Court may want to define what constitutes a "significant number" in the context of the "common work area" analysis, as well as whether there are temporal and geographical limitations. As set forth above, simply applying the existing precedent confirms that Plaintiff failed to establish that there was a high degree of risk to a significant number of workers. Defendant respectfully contends that resolving these issues will only further confirm same.

This Court has not specifically opined what constitutes a significant number of workers. In *Funk*, this Court concluded that the failure of any contractor on a large construction site to use fall protection exposed a significant number of workers to danger. However, that did not require

a definition of "significant." In *Alderman II*, this Court rejected "six" as a significant number of workers. Rejecting six, does not mean that seven, eight, ten, or even twenty is the magic number to constitute a significant number of workers. And, in this case, Plaintiff contends that approximately eight people at heights not wearing fall protection (without regard to whether they needed to be wearing fall protection) is sufficient. Defendant respectfully disagrees that this is or should be the law.

It bears repeating that the "common work area" exception is an exception to the general rule of non-liability. The *Funk* circumstances arose in a different era, where the employees of subcontractors were largely ignored. Indeed, in *Funk*, the evidence suggested that the defendants took almost a Darwinian approach—assuming that workers at heights that fall will be weeded out over time. Construction sites have changed significantly since *Funk*. While Plaintiff's pre-2008 litigation focused on Defendant failing to supply him fall protection, Plaintiff admitted during trial that his employer had fall protection in the gang box. Defendant posits that this Court may not have remanded in 2008 had it known that Plaintiff had fall protection available to him and that he never once used fall protection on any worksite. No supervisor of any workplace can ensure that every employee will use even available safety devices with the performance of every task. And this Court's recent decisions in *Ormsby, Latham II, and Alderman II*, confirm that the "common work area" exception elements are not to be construed in a manner that allows the exception to swallow the rule of nonliability or in a manner that will lead to strict liability.[5]

In *Funk*, of course, a witness for each of the two defendants testified that nobody on an entire, massive construction site was using fall protection. While there was no "number" supplied to quantify the number of workers at risk, the inference was that it was truly a

[5] The workers' compensation system exists to provide far more certain compensation for injuries.

significant number of workers. Here, Plaintiff has limited his evidence to two small mezzanine areas on a very large construction project. Plaintiff could have chosen to engage in discovery (both in 2004-2005 and after the remand from *Latham III*) to determine whether there was a *Funk*-like failure. Plaintiff did not do so. There is no evidence or even an inference of evidence that the instant construction project was akin to the circumstances of *Funk*.

Instead, by design, Plaintiff limited the analysis to his self-serving, 10-year-old memories and the vague recollections by Scott Schrewe (who Plaintiff had known for 20 years). There were no defense concessions regarding a pervasive absence of fall protection. Plaintiff did not depose witnesses from the plumbers, electricians, HVAC workers, or other tradesmen that worked on the site at any time. Plaintiff did not try to establish that any of the dozens of workers elsewhere on the site at the time of the incident were working at heights, much less that they were doing so without necessary fall protection or otherwise exposed to any danger. This evidence not only falls short of *Funk*, it falls well short of *Funk*.

If this Court opts to set forth a specific quantity that is a "significant number," the number should reflect circumstances akin to *Funk*. This is certainly a number greater than even twenty. Otherwise, this Court could and should conclude that proofs suggested by Plaintiff simply do not meet the standard of a "significant" number of workers set forth by *Funk*.

At the other temporal extreme, in *Ormsby*, this Court ruled that the significant number of workers element is determined based on when the plaintiff is injured. *Ormsby, supra* at 59 n 12. Again, as noted in Defendant's primary brief, Defendant stands alone in having the Michigan Court of Appeals refuse to apply *Ormsby* literally in this regard. Defendant's Application for Leave to Appeal, pp 36-37. Later, in *Alderman II*, this Court reversed the Court of Appeals' expansive view of the time (and geography) of an incident, limiting the number of workers to

those who were at risk of electrocution at the same time as the plaintiff. In reversing, this Court rejected the Court of Appeals' inclusion of (a) workers on the site at the same time, but in different areas; and (b) workers on the site at different times, but potentially exposed to similar dangers. This Court's ruling in *Alderman II* expressly cited *Ormsby*, certainly suggesting that the "time of the incident" controls the "significant number of workers" analysis.

Here, Plaintiff was one of only two workers planning to work on the mezzanine at the time of the incident. Plaintiff noted that there may have been a few HVAC workers on the ground in the vicinity (Tr IV, 70-71), but the other workers on the site were in entirely different areas. Barton Malow superintendent Ted Crossley confirmed same (Tr II, 142-143, 151). Moreover, there is absolutely no suggestion that Plaintiff's failure to wear personal fall protection exposed any other worker on the site to a danger. Thus, as it relates to the time of the incident, there were only two workers at risk of falling. Defendant raised this very issue when moving for a directed verdict (Tr V, 39-40). Defendant respectfully contends that the trial court erred when denying same, given *Ormsby*, *Alderman II*, and the various unpublished decisions of the Michigan Court of Appeals construing *Ormsby*.

Conclusion

Defendant was entitled to summary disposition based on Plaintiff failing to prove that there was a high degree of risk to a significant number of workers at the time of the incident. If Plaintiff wants to broaden the analysis, Defendant observes that Plaintiff has still not shown that a significant number of workers were exposed to a danger, either as Plaintiff encountered it or as otherwise described. And Plaintiff's evidence comes nowhere near the rampant failure to wear fall protection admitted by the defendants in *Funk*. Plaintiff's evidence also failed to show that a significant number of workers were at risk at the time of the incident. Thus, regardless of

whether and how this Court chooses to clarify the high degree of risk to a significant number of workers element, Defendant respectfully contends that Plaintiff simply failed to meet his burden of proof. Consequently, this Court should reverse the lower courts and rule that Defendant was entitled to dispositive relief.

CONCLUSION AND REQUEST FOR RELIEF

Defendant respectfully requests that this Honorable Court reverse the lower courts and rule that Defendant was entitled to dispositive relief.

Respectfully submitted,

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List of Attachments

1 Plaintiff's brief in opposition to motion for summary disposition

2 Defendants' reply brief in support of motion for summary disposition

3 *Alderman v JC Development Communities, LLC,* unpublished per curiam opinion of the Michigan Court of Appeals(Docket No. 285744, issued August 25, 2009

4 Defendant's Supplemental Brief in MSC Docket No. 132946